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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MANHATTAN EYE, EAR & THROAT HOSPITAL,

Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD and LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES UNION, RWDSU, AFL-CIO,

Respondents.

APPENDIX TO PETITION OF MANHATTAN EYE, EAR & THROAT HOSPITAL FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK CITY BRANCH OFFICE

MANHATTAN EAR, EAR AND
THROAT HOSPITAL

and

DISTRICT 1199,
HOSPITAL AND
HEALTH CARE
EMPLOYEES UNION,
RETAIL, WHOLESALE
AND DEPARTMENT
STORE WORKERS
UNION, AFL-CIO

Case Nos. 2-CA-20501
2-CA-20571
2-CA-20590
2-CA-20710

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DECISION

Statement of the Case

HAROLD B. LAWRENCE,

Administrative Law Judge: This case was heard by me in New York City on the 4th, 5th, 6th, 7th and 8th days of March

1985. The frequently amended consolidated complaint is founded upon charges filed on various dates between 2 August 1984 and 6 December 1984 by District 1199, Hospital and Health Care Employees Union, Retail, Wholesale and Department Store Workers Union, AFL-CIO, hereinafter referred to as "the Union." Some 20 violations of Section 8(a)(1) and (5) of the National Labor Relations Act ("the Act") are charged against Manhattan Eye, Ear and Throat Hospital, the Respondent, consisting in the main of prompting and assisting employees to abandon and decertify the Union, exclusion of Union representatives from access to the premises and to unit employees and refusal to discuss and negotiate certain changes with the Union. The Respondent denies commission of most of the acts alleged as wrongdoing and statutory violation. Some of the alleged conduct is admitted

subject to affirmative defenses which I have discussed in connection with the allegations to which they pertain.

The parties were afforded full opportunity to be heard; to call, examine and cross-examine witnesses; and to introduce relevant evidence. Post hearing briefs have been filed on behalf of the General Counsel and on behalf of the Respondent.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction

There is no issue as to jurisdiction, the pertinent facts with respect thereto having been admitted in the Respondent's answer. The Respondent is a New York corporation which operates a hospital at 210 East 64th Street, New

York City. It grosses more than $250,000 annually and receives products valued in excess of $50,000 annually from points outside New York State. Respondent admits and I accordingly find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act, and that the Union is now and has been, at all times material in this case, a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. General Background[1]

All of the registered nurses

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1. The matters narrated without evidentiary comment are those facts found by me on the basis of admissions in the answer, data contained in the exhibits, stipulations between or concessions by counsel, undisputed or uncontradicted testimony and, in instances where conflicts in the testimony did not warrant discussion, the testimony which I have credited.

employed by Respondent constitute an appropriate collective bargaining unit, for which Respondent has recognized the Union as the exclusive collective bargaining representative under collective bargaining agreements since 1980.

On 13 June 1984,[2] the most recent such agreement expired without renewal and the Union commenced an economic strike. The testimony establishes that the most intractable issues of the strike, such as the Union's demand for every second weekend off, were matters of concern to ancillary service workers, but not to the registered nurses. The nurses were upset that they were compelled to lose work for that reason and matters were not helped by the Union's insistence

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2. All dates hereinafter mentioned are in 1984 except as otherwise stated.

that the nurses not return to work until Respondent and the Union had signed a contract, even if the Union reached an agreement with the League of Voluntary Hospitals. In fact, the picket line continued in front of Respondent's hospital after the Union reached agreement with the League in late August or early September and Respondent, as of the date of the hearing, still had not been notified that the strike was officially ended. Thus, nurses could not return to work, even though agreement between the Union and the League seemed to have been reached, because the picket line continued in front of the hospital. In the few negotiating sessions which had been held prior to the commencement of the strike, nurses' concerns had received minimal attention.

On 18 July, Farideh Ajdari, a registered nurse, filed a petition to

decertify the Union. A Stipulation for Certification on Consent Election was approved by the Region on 1 August. The cards requesting decertification which the nurses signed were typed by a secretary employed by the hospital on cards which came from the hospital stationery stock. The election was scheduled for 30 August, but has never been held because of the pendency of the unfair labor practice charges filed by the Union against the Respondent which are the subject of the instant proceedings.

Both the General Counsel and the Respondent deem the strike to have ended on 29 August, although the Union has never officially declared an end to the strike. Eleanor Herbert, Director of Nursing, testified that she considered the strike over as of 29 August and counsel for the General Counsel, in her post hearing brief,

cites Herbert's testimony in support of an assertion of that effect. The picket line remained.

On 6 September, Ajdari delivered a letter dated that date to Eleanor Herbert, Director of Nursing, which read as follows:

> Dear Mrs. Herbert:
>
> Because a majority of the registered nurses at this hospital no longer want to be represented by District 1199 as our bargaining agent, I'm submitting the enclosed signed index cards which state that he/she no longer wants District 1199 as his/her bargaining agent at Manhattan Eye, Ear & Throat Hospital.
>
> Therefore, I ask management of this hospital not to negotiate anymore with District 1199 as our bargaining agent.
>
> Yours very respectfully,
>
> Farideh Ajdari, RN

On 7 September Respondent withdrew recognition from the Union, contending, as it does in these proceedings, that it had a good faith doubt as to whether the Union

represented a majority of the nurses in the unit. It followed suit on 10 October by cancelling authorization previously granted for Union membership meetings on the premises scheduled for the three shifts on 16 October because the RN division was listed in the meeting flyer along with the Guild Division and the Hospital Division, which the Union continued to represent. Union representatives who persisted in remaining on the premises on 16 October were directed to leave the premises and were arrested when they refused. New rules were promulgated limiting access to the premises.

Issues are thus presented as to whether Respondent unlawfully encouraged and assisted a decertification movement, whether it withdrew recognition of the Union on the basis of a bona fide belief that the Union no longer represented a majority of the nurses in the bargaining

unit and whether its withdrawal of recognition was tainted by commission of unfair labor practices which compromised the Union's ability to represent the nurses.

B. Supervisory of Status of Certain Personnel

Respondent admits in its answers that during pertinent times Carol Handfus was Acting Director of Human Resources; Eufemia James was a per diem relief supervisor; Fransuhi Partikoglu (also known in the hospital as Frances Partik) was head nurse; Bercuhi Oksucoglu (also known in the hospital as Suzy Oksus) was an assistant head nurse; and Catherine McDonnell was a supervisor. McDonnell testified that she had been acting as the evening supervisor since 19 February 1984. James appears, from testimony in the record, to have worked all shifts. Respondent admits that they were

supervisors within the meaning of Section 2(11) of the Act but denies that James, Partikoglu, McDonnell or Oksucoglu were acting in their roles as supervisors or on the Hospital's behalf in connection with any conduct alleged in the complaint. This denial is of little avail to Respondent, for it is well settled that an employer is bound by the acts and statements of his supervisors, whether specifically authorized or not, and therefore is responsible for unfair labor practices committed by low level supervisors. Southern Stevedoring Co., Inc., 230 NLRB 609, 615 (1977); Collectramatic, Inc., 267 NLRB 866, 871 (1983).

The facts of the case, as I have found them, show the communication by these persons to at least several nurses of a "sufficiently uniform" message, as well as a relationship to management "sufficiently intimate to

give an authoritative gloss to their statements and to cause employees to reasonably believe that they were accurately reflecting operative conditions and personnel policy." Liability under the Act therefore exists even without an actual determination of their supervisory status. See Crawford Container, Inc., 234 NLRB 851, 859 (1978). In this connection, it is to be noted that Section 2(13) of the Act expressly provides that in determining whether they acted as Respondent's "agents," so as to render Respondent responsible for their acts, "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." See Collectramatic, Inc., supra.

I consider Respondent's reliance on Times-Herald, Inc., 253 NLRB

524 (1980) to be misplaced. In that case, it was observed that in order to find liability for communications such as those in the instant case, there must be some evidence that the employer has

> encouraged, authorized, or ratified the conduct or that the supervisor acted in such a manner as to lead the employees to reasonably believe that he was acting on behalf of management.

However, the situation under discussion in Times-Herald involved an employee who made an inquiry of the employer respecting decertification procedure but who was both a supervisor and a member of the unit. Since he was a member of the unit, the question of whether the Respondent was responsible for his antiunion conduct could not be resolved in the absence of evidence of encouragement and authorization. That duality of status does not exist in the present case.

C. Catherine McDonnell

The complaint alleges, and the Respondent denies, that on or about 21 July Respondent, acting through McDonnell, urged and encouraged an employee in the unit to sign a card to decertify the Union. In addition to its denial, the Respondent asserts certain affirmative defenses.

The first of these is that the conduct alleged is protected by Paragraph 8(c) of the Act. The second is that it is protected by the First Amendment to the United States Constitution. Section 8(c) of the Act provides simply that expression and dissemination of opinion shall not be deemed to be, or to be evidence of, an unfair labor practice under the Act "if such expression contains no threat of reprisal or force or promise of benefit." An analysis of the evidenced

relating to McDonnell's actions must therefore focus on the presence or absence of any coercion or promise of benefit.

The Respondent also alleged as an affirmative defense that the claim embodied in the allegation was "before the Regional Director" when the original consolidated complaint was issued on 28 November but it was not included. From this it is argued that its inclusion in the Order Amending Consolidated Complaint dated 29 January 1985 is a nullity since the period of the statute of limitations had run. Respondent arrives at this result by asserting that "the Regional Director lacked authority to revive a dismissed claim outside of the period of statute of limitations prescribed in the Act." This is coupled with an affirmative defense to the effect that the claim was

waived because the charging party did not appeal the Regional Director's dismissal of the claim on 28 November. For good measure, the Respondent asserts that the Union is estopped by its failure to appeal "and by the doctrine of laches." These two affirmative defenses (labelled the Fourth Defense and the Fifth Defense) are hereby dismissed. The failure of the Regional Director initially to include a charge in a complaint does not constitute a dismissal of the charge. Consequently, its inclusion by amendment of the complaint at a later date does not constitute "revival" of a charge already found insupportable in evidence or law.

In a Sixth Defense, Respondent asserts that the charge filed in Case No. 2-CA-20501 did not give fair notice of the claim contained in Paragraph 13(b) and the claim is therefore barred

by the statute of limitations prescribed in the Act. Counsel for Respondent advances this defense though the charge recites that Respondent "urged and encouraged an employee . . . to sign a card to decertify the Union" and the charge sets forth that the employer violated Section 8(a)(1) and (3) by discriminating in regard to terms and conditions of employment "in order to discourage membership in District 1199 and has taken other actions, including but not limited to the initiation, direction, coordination and implementation of a campaign to decertify District 1199 . . . and otherwise acted to undercut District 1199's position as bargaining representative . . ." The allegation contained in the amended consolidated complaint and the original charge are couched in practically identical

language. The relationship between the two is explicit. Accordingly, the Sixth Defense is dismissed.

On the merits, the case against McDonnell rested on the testimony of Soledad Soriano, a staff nurse on the evening shift. She testified that McDonnell, the evening supervisor, telephoned her on the evening of 21 July. Both live in the nurses' residence quarters at 210 East 64th Street; Soriano is across the corridor from McDonnell and one door down. They do not socialize, though they are on normally cordial terms. McDonnell asked Soriano if she was staying in the Union; if not, she had a card for her to sign. Soriano responded that she would do whatever she, Soriano, thought was best. At about 10 o'clock the next morning, McDonnell knocked on her door and told her to sign a card, which she

had with her. Soriano refused, saying she was not signing anything, to which McDonnell responded, "You know the score." Soriano then said she would think it over, whereupon McDonnell said, "You have only until 10 o'clock to think it over." McDonnell gave Soriano her paycheck and left.

According to McDonnell, she was asked by Brolli Narciso, a staff nurse who was working with Ajdari on the decertification drive and had accompanied Ajdari on a visit to the NLRB office in New York City on 18 July, to let Soriano know, if she saw her, that Narciso and Ajdari were stationed at the Barbizon Hotel with decertification cards. McDonnell opted to call Soriano, rather than leave conveyance of the message to chance. Her visit the following morning was solely for the purpose of delivering

Soriano's paycheck. The card she asked Soriano to sign was for the paycheck, "which is a custom when you give a paycheck."

The testimony of neither of these witnesses is free from doubt, not only because their accounts directly contradict each other with respect to matters pertinent to the issues of the case, but because subsidiary details of their testimony are burdened with doubt. For example, in McDonnell's case, it appears that the invariable practice at the hospital was to deliver nurses' paychecks at the nursing office or on the hospital floor, never in the residence, and that the nurses normally signed for receipt of checks on a yellow paper or pad, not on white index cards. Moreover, according to McDonnell, Soriano withdrew into her room without signing anything, yet she appears to

have been permitted to retain her paycheck without accounting complications. By her own testimony, McDonnell also seems to have been willing to become far more involved than requested. McDonnell testified that Narciso asked her to talk to Soriano because Narciso and Soriano were not on good terms (Narciso lived on the same floor at the residence). Narciso also asked McDonnell to call a nurse named Matthews, whom she was having trouble reaching. McDonnell went to the trouble of telephoning Soriano, rather than waiting for a chance encounter, and undertook to call Matthews even though that task was expected to be troublesome.

However, the difficulties with Soriano's testimony, on which the General Counsel relies, are much more grave. She never read the card which McDonnell supposedly asked her to sign.

The remarks she attributes to McDonnell sound ominous, but Soriano never testified that McDonnell referred to the card as a decertification card. The General Counsel contends that Soriano reasonably inferred that it was a decertification card because of a telephone conversation which Soriano claims to have had with Matthews. Soriano testified that Matthews called her and asked if she had been asked "to sign a card" and Matthews told her that McDonnell had just called her to go to the hospital to sign a card, which would then permit her to go back to work "and whatever the union is demanding they will give more than what - the rate is being given."

This testimony provides no direct or specific identification of the nature of the card which McDonnell is supposed to have asked Soriano to sign.

Further difficulty is presented by Matthews' testimony, which made it clear - emphatically - that her conversation with McDonnell had not at all been as described by Soriano and that Soriano had no basis for quoting it because Matthews never told Soriano about it. Matthews testified that in her conversation with McDonnell, McDonnell only asked her to see Narciso at the Barbizon. Matthews testified that that was the entire conversation; that McDonnell never told her that if she wanted to sign a card to get rid of the Union she should come to see McDonnell; that McDonnell never mentioned anything like that or anything about a card, and never said anything about decertifying the Union. Matthews further testified that she never spoke to Soriano about her conversation with McDonnell, never told Soriano that McDonnell had said she

had a card for Matthews to sign, and never told Soriano that McDonnell said she should get over to the hospital if she wanted to sign it. She thus gives the lie to Soriano quite directly.

At most, McDonnell is shown to have relayed messages from Narciso. The General Counsel seeks to prove that McDonnell attempted to coerce Soriano into signing a decertification card without evidence that the card which Soriano was asked to sign was a decertification card. Soriano's testimony is sharply disputed by testimony of witnesses with equal or better credibility. Aside from that, what little is proved regarding McDonnell's actions seems not to establish conduct of an illegal nature.

It adds up to a case considerably short of a preponderance of the evidence. Accordingly, I do not

find that McDonnell unlawfully solicited Soriano's signature on a decertification card. It is therefore unnecessary to consider the constitutional defense raised by the Third Defense, which is better raised in the United States District Court in any event. The Second Defense, based on Section 8(c) of the Act, is dismissed for the reason that there is no evidence that McDonnell's activity insofar as it has been proven, consisted of "[T]he expressing of any views, argument or opinion, or the dissemination thereof . . ." The defense is therefore inapplicable. The burden was upon Respondent to establish that McDonnell's actions consisted of expression of opinion, which Respondent failed to do.

D. Partikoglu and Oksucoglu

It is contended that on or about 11 July, during a dinner

conversation, Fransuhi Partikoglu (Partik) and Bercuhi Oksucoglu (Oksus) urged Monica Mitchell, a staff nurse, to resign from the Union, to affiliate with the New York State Nurses Association and to circulate a decertification petition. Mitchell testified that she entered a restaurant, saw them sitting there, asked if they were going to be there long, was invited to join them and had dinner with them. They spent 45 minutes to one hour together.

According to Mitchell's testimony, after general conversation the discussion drifted into the subject of the strike, which was set for 13 July. Partik commented that she thought Mitchell was "too classy" to be in the Union and that the nurses, being a separate group, should be in a more professional union that District 1199. She "suggested that . . . I . . . pass a

slip around to other nurses saying that you want to be out of the union." Mitchell responded that the Union had obtained benefits for the nurses, she liked it and would not be interested in passing a slip around. Oksus said, "What about the New York State Nurses Association." Mitchell answered that it was not as powerful as District 1199 and was management-oriented. The rest of the conversation pertained to matters not connected with the Union and "there was nothing else said about it. I said I wasn't interest in doing it and they didn't make any other comment either way, it was just - after that, it was just table conversation."

At the time of this conversation, Mitchell was a member of District 1199's negotiating committee, a circumstance known to both Partik and Oksus and which, in fact, was mentioned

in the course of the conversation. Counsel for the Respondent argues that this makes it implausible that Partik and Oksus would have attempted to enlist Mitchell in a decertification movement and I agree. Nevertheless, I credit Mitchell's account of the conversation. The question is whether it supports the General Counsel's allegation of violation of Section 8(a)(1) of the Act. The nature of the suggestion being made is very clear but it is not clear that there existed any element of coercion. There certainly was no explicit coercion and none appears to derive from the surrounding circumstances.

The conversation appears to have been good-humored and Respondent argues that the remark about Mitchell being "too classy" to be in the Union was made in jest. Reading it in cold

print did not reduce me to hysteria and there is no evidence that Mitchell was greatly amused by it. Remarks made in jest in the workplace have been held to be in violation of Section 8(a)(1) of the Act when they tended to be of a coercive nature. See Ethyl Corporation, 231 NLRB 431, 434 (1977). In the present case, we are dealing with a conversation among persons who, according to Mitchell's own testimony, have known each other for 12 years. Mitchell rejected Partik's suggestion immediately and reaffirmed her support of the Union discomfort. Unlike Soriano, she did not feel the need to ask for time to think. Furthermore, Mitchell did not testify that the matter of the strike or the Union was first raised by Partik or Oksus; she was uncertain as to who raised the subject. The conversation was mostly social,

having opened with inquiries by Partik and Oksus about Mitchell's children. Mitchell mentioned her union activities -- she was on the negotiating and labor-management committees -- and that her concern was having to go out on strike with the cleaning people and the other service workers. She thus practically invited the comments attributed to Partik. The word "decertification" was never used; though Mitchell had signed an affidavit for a Board investigator in which the word was used, she testified that it was not used during the conversation with Partik and Oksus. Asked if Partik or Oksus threatened her, Mitchell testified, "In no way."

Consideration of the actual statements made during Mitchell's conversation with Partik and Oksus and of the circumstances in which they were

made, taking into account the known backgrounds of all the parties to it, leads me to conclude that the remarks of Partik and Oksus did not tend to have a coercive effect. The remarks attributed by Mitchell to Partik are of the kind which fall within the protection of the United States Constitution and the provisions of Section 8(c) of the Act, as contended by Respondent in the Second and Third Defenses set forth in its answer. Though my finding in this respect precludes holding Respondent responsible for the remarks, I note also that the evidence respecting the dinner conversation leads me to conclude that Partik was not, at the time, speaking on behalf of management. The incident involved nothing more than expression of her personal opinion and was so understood by Mitchell at the time.

The allegation was not proved by a preponderance of the evidence and there was no proof of the essential element of coercion. I emphasize this point because Partik was not called by Respondent to testify regarding her remarks and no explanation for her absence was furnished. Moreover, the credibility of Oksus was undermined by the fragmentary nature of her recollection and by inherent contradictions. She testified on direct examination that it was Mitchell who raised the subject of the Union, by asserting that she felt sorry for the nurses because they could not resign from the Union without losing benefits. Despite the improbability of such a statement coming from Mitchell, Oksus also asserted that only Mitchell could have raised the subject because "I didn't know there was such a thing that

they can resign or get out of the Union. I didn't know at all." Later, she testified that she did not recall who made the statement that it was possible for somebody to resign from the Union and then, on being pressed, admitted that she herself made the statement. This lack of credibility does not, however, supply to the General Counsel's presentation the evidence necessary to support the allegations of the complaint.[3]

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3. I reject Respondent's theory, set forth in its post hearing brief, that since, according, to Oksus, Mitchell had never before joined Partik and Oksus for a meal, her presence on this occasion must have been for the deliberate purpose of eliciting statements from them which would be violative of the Act. This suggestion of something in the nature of entrapment is sheer speculation based entirely on Oksus' testimony that Mitchell first brought up the subject of the Union.

E. Violations of Section 8(a)(1) by Eufemia James

Eufemia James is a part-time clinical nursing supervisor who also had separate private business interests and worked at a veterans hospital. It is contended that she violated the Act in the course of conversations with several nurses: that on 23 July she urged a nurse to quit the Union and affiliate with the New York State Nurses Association; that on 26 July she urged an employee to sign a card to decertify the Union; that on 27 July she urged an employee to quit the Union and offered to help the employee draft a letter of resignation; that on 9 August she encouraged an employee to resign from the Union and instructed the employee in the procedure; and that sometime during the last week of August she told an employee on the telephone that in order to return to work, she would have to

send District 1199 a letter resigning from the Union, and offered to help write the letter. The case against James rests on the testimony of Soledad Soriano, Alicia Young, Rosie Merka and Patricia Simmons.

1. Soledad Soriano

Soriano testified that James called her on the residence telephone several days after McDonnell spoke to her. McDonnell had spoken to her on the telephone on 21 July and had seen her the following morning, which fixes the date of the telephone call from James at 23 July. Soriano did not recall the time of day at which she received the call, but recounted the conversation as follows:

> She said she was calling all the Filipino nurses to go back to work because she was asked by Mrs. Herbert and Mrs. Rudan -- Mr. Rudan. And if I want to go back to work, I should contact Mrs. Herbert and if -- before I could go back to work I have to write to JoAnn

> Marshall resigning from District 1199 and then I can join the New York State Nurses Association . . . . And she finally stated that if I don't know what to do, I can contact Ms. Narciso and she will show me what to do. . . . So I said to her, "I'll just let you know when I feel like going to work."

James flatly denied having discussed the strike or resignation from the Union with Soriano. She was emphatic: it was not a matter of not remembering whether such a conversation had occurred; she knew it had not occurred. The clarity of James' memory with respect to this conversation stands out in sharp contrast to her inability to remember other conversations of critical importance to the case which are discussed elsewhere in this decision. James professed to be clear in her mind in this instance because she had a basis for recalling the conversation. She asserted that it stood apart in her memory from hundreds of telephone calls which she made in

connection with her campaign for elective office in the Philippine Nurses Association because she had spoken to Soriano by telephone previously and Soriano had once called her for real estate advice. I found that explanation irrelevant and unpersuasive. If anything, the type of conversation she was having with other nurses -- at Rudan's request -- made it inevitable that she would have discussed the strike with Soriano.

The Respondent contends that, despite the strong start of her testimony, Soriano became uncertain afterwards and was unable to state whether James told her she could or should resign from the Union. I detect no uncertainty whatsoever: she testified that James told her she "could" write to Marshall and "could not" come back to work without having done so.

2. Alicia Young

Alicia Young testified that James called her at home on 25 July and left a message to call her back at her home telephone number. Young returned the call on 26 July. In her testimony, Young quoted James to the following effect:

> In the conversation she told me that a lot of nurses had signed a petition that they were resigning from the union because the union is not assisting any more and it's not a professional union. So she told me to write to Joann Marshall if I wanted to resign also from the union. . . . That's all she told me, that if I'm interested, just to resign from the union by writing to Joann Marshall and I said that I will must wait (sic) until the strike is over. . . . She said to me that maybe the strike will not be over and it will take time, so she advised me that if you are decided to send a letter, send it by certified mail to Joann Marshall. So I answered her that I'm just going to wait until the strike is over and that's all.

James called again a week later, at which time she told Young

> almost all the nurses are resigning already and this week, this coming

> week, she said that they were coming back to work and if you want to be interested to come back, you can come back any time and will arrange you how to come back. But you (sic) said that you have to resign first from the union before you can come back to work.

Though Young testified that that was the entire conversation, after reviewing a portion of an affidavit which she had furnished to a Board investigator, she testified, in addition, that James said something else:

> She said to me that I had to resign from the Union. I will write the letter to Joann Marshall or they are going to send the resignation to Joann Marshall.

When she told James she would sit out the strike, James' response was,

> Well, it's up to you, but if you want to go back to work you have to make this letter saying to Joann Marshall or you bring the letter and then we will arrange for how you do it.

Young testified that on the telephone James used the word "resign" many times: "Many times, just to write the letter that you want to resign to the union."

Respondent attacks Young's credibility on the basis of inconsistencies in her testimony respecting the number of telephone conversations she had with James and the precise statements attributable to James in each. Unquestionably, the various recountings of the conversations were not consistent in all details, but, in the main, Young's testimony was a coherent, consistent and credible account to the effect that James called her and told her that other nurses were returning to work and that she could also return if she quit the Union and that James expressed her opinion that the strike might be a lengthy one.

The Second Order Amending Consolidated Complaint adds an allegation that on or about 26 July James urged and encouraged an employee to sign a card to decertify the Union. The employee is not named, but I presume

from the alleged date that the reference is to Young. The matter is academic, for no proof of any kind was adduced in support of the allegation, whether with respect to Young or anyone else.

3. Rosie Merka

Rosie Merka, a staff nurse on the night shift, testified that during the strike James called her at home three times. On at least one of these occasions, James called from the hospital. Prior to these telephone calls she had never spoken on the telephone with James, had never socialized with her, eaten with her, discussed the Philippine Nurses Association with her, seen James outside of work or had any conversation with her beyond customary salutations and greetings.

The first telephone call was on 27 July, when James telephoned her at home in the evening. She described the conversation as follows:

> She called me and then she said I'm Mrs. James, a Filipino nurse. I was asked by Mr. Rudan to called the Filipino nurses to return to work.

Merka's account of the conversation, like Soriano's, asserts that James started with an express statement that she was calling the Filipino nurses to return to work. The balance of the conversation with Merka related to the fact that both women were Filipinos and spoke a particular dialect and it was taken up with purely personal affairs. Merka promised to call James back when she made a decision. A week later, James called her again, around noontime. She described the conversation on this occasion as follows:

> She said you're still not back to work. She said write to Ms. Joann Marshall. She's in the nursing division of 1199. If I could help you to write a letter if you need some help. . . . So she gave me the address of Ms. Joann Marshall. . . .

The third conversation took place when James called her in the

evening a week later. On this occasion the conversation went as follows:

> So she called me and then she said that--you know she said why are these Filipino nurses they are so hard headed to return to work, you know. She said, you know I'm calling again for the Filipino nurses because we're going to open another floor. So she said they are very nice. She said Mr. Rudan and Mrs. Herbert were very nice and understanding and if we ask some days off or long vacations for whatever, overtime, private duties, they will give us favors. Now this time they're asking us to return to work and we still -- we could not cooperate with them to return to work. . . . she said 1199 is asking too much and you have already good benefits without 1199.

Merka testified that during the telephone conversations she did not feel threatened or coerced and James did not make any statements indicating that her failure to come back to work would have any bad consequences. She explained the reference to writing a letter to Ms. Marshall as something James suggested to let the Union know that she was returning to work, if she so decided. The conversations were friendly in tone.

In the course of her initial testimony, Merka indicated that the remark by James about opening another floor was made in the first conversation as well. She quoted James as saying, "She said that I'm calling for you to return back to work because I want to open the floor." In later testimony, however, she asserted that what James told her was that Herbert and Rudan were simply looking for reciprocation for their past understanding and cooperation with the Philippine nurses and their special problems. No new promises were being made in order to induce them to return. James made statements about how kind Mrs. Herbert, the Director of Nursing, and Mr. Rudan, in charge of education, had been in the past when Philippine nurses requested longer vacations, wanted overtime, or wanted private duty. The witness agreed with a spoon-fed question by Respondent's

counsel which summarized the matter to the effect that James was in effect saying nothing more than that in return for past fairness to Filipino nurses, the nurses should do them a favor and come back to work. She agreed that no special treatment was promised to returnees, and James never promised anything, threatened anything or made her feel threatened.

4. Patricia Simmons

Patricia Simmons, a day shift nurse, testified that she had wanted to return to work several times but did not want to cross the picket line. In late August, she heard on the radio that the Union had arrived at an agreement with the League of Voluntary Hospitals and that it appeared that the strike was almost over. The picket line was still in front of the hospital, so she telephoned the nursing office to find out the procedure for returning to

work. James answered the telephone and told her to send a letter by certified mail to Jo-Anne Marshall to the effect that she resigned from District 1199. James dictated the format of the letter to her on the telephone. It was something like, "I, Patricia Simmons am resigning from 1199. . ." James told her that that was the procedure she had to follow to come back to work.

According to Simmons, the information given to her by James was consistent with her own understanding of what had to be done, and she was not even sure which of them first mentioned the idea of writing a letter to District 1199. She readily conceded under examination by Respondent's counsel that she was not threatened and had already decided to return to work when she placed the telephone call to the hospital which was answered by James.

5. James' Testimony

Eufemia James testified that she was on very friendly terms with Rudan, the Director of Education, who mentioned to her that the hospital was calling nurses to find out whether they were planing to return to work so that it would always know how many floors to open up. During this period in July, she was campaigning for office in the Philippine Nurses Association and making hundreds of telephone calls at her own expense from her home. Rudan asked her to inquire, when she spoke to any of the hospital's own nurses, whether they were planning to come back to work and let him know. She did this. That is her explanation for the inquiries she made.

In the course of making these telephone calls, James spoke to most of the Respondent's nurses, but was unable to say precisely how many. She testified that her practice was to

discuss Association business with them first and then ask if they had any intention of returning to work. Some of them told her that they were afraid to cross the picket line. Some said they were coming back to work. Some said they were not. She reported the responses to Rudan.

According to James, the subject of resigning from the Union only came up in conversations with some nurses and then only because they told her that they wanted to return to work but were afraid they would be fined for crossing the picket line. James insisted that on every such occasion she told them the decision was theirs to make and that she never told anyone to resign from the Union or that they could not come back to work unless they quit the Union. She testified that some of the nurses said that they would like to go back to work

> and they said that they heard that they -- they're afraid to be fined and they said that some of their co-workers told them that they have to resign from the union. And I told them that I know of some nurses that came back to work and have resigned to protect themselves. But I said it was their decision to make.

The campaign in the Philippine Nurses Association related to an election for officers and the board of directors of the Association which had originally been scheduled for the last Friday of July but had been postponed to November. The General Counsel considers it suspicious that though the rescheduling was accomplished before 27 July, James continued making the telephone calls. As they would have undoubtedly been made ultimately in any case, I am not persuaded that her continued telephone activity is any evidence that the calls were really being made to induce the nurses to return to work and to resign from the Union.

6. Analysis and Conclusion

The applicable general principle of law is that employers may not solicit employees to withdraw from union membership, but they may bring to employees' attention their right to resign from the union, may supply information as to the procedure for doing so and may even supply forms. The employer may provide same in response to employee request or furnish it unsolicited. Ace Hardware Corporation, 271 NLRB No. 178 (1984); Perkins Machine Co., 141 NLRB 697 (1963); Cyclops Corporation, Tex-Tube Division, 216 NLRB 857 (1975). The employer's involvement must be limited and statements by the employer must be free of threat and coercion or promise of benefit. The critical factor is not the actual effect or lack of effect of the employer's statements on the employees' actions or frame of mind, but whether the

employer's statements are of a type which tend to interfere with the employees' free exercise of their rights under Section 7 of the Act. Choctawhatchee Electric Cooperative, Inc., 274 NLRB No. 84 (1985).

An employer would not seem to violate the Act if he makes no attempt to ascertain whether employees will avail themselves of the rights to which they have been educated by the employer, does not assist in more than purely ministerial fashion, "or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation." R.L. White Company, Inc., 262 NLRB 575, 576 (1982). The kind of conduct proscribed is that in which an employer does the mailing, supplies stationery and postage, retains copies of the letters

of resignation in its files, prepares the letter, and summons employees to executive offices to sign the letters. KDI Precision Products, Inc., 176 NLRB 135, 138 (1969). The conduct must not amount to solicitation by the employer, by words and actions, of union resignations or to such a marked indication of the employer's favor of such action that a situation would be created in which "employees would tend to feel peril in refraining from signing the petition." Foothills Food, Inc. d/b/a Erickson's Sentry of Bend, 273 NLRB No. 11 (1984), sl. op., p. 5.

Questions about employee strike intentions unaccompanied by threats, promises or other coercive conduct are not per se unlawful, "but must be judged in light of all of the relevant circumstances." Mobile Home Estates, Inc., 259 NLRB 1384 (1982) (interrogation respecting employee's

willingness to cross picket line in event of strike accompanied by statement that without union employer could afford to pay better wages).

Applying these criteria to the most extreme conduct by James as to which there is credible testimony, it is apparent that there are some respects in which it may fairly be argued that she overstepped the bounds of permissible conduct. A review of her testimony and that of the four nurses who testified to their conversations with her leaves no doubt that she called and made inquiries respecting their intentions with respect to the strike at the behest of Respondent's management; made references to resignation from the Union and in at least some instances associated resignation with their return to work; made follow-up telephone calls to ascertain what they intended to do; and began some of the conversations with the

flat statement that she was calling them back to work.

The most serious questions about James' conduct are raised by the evidence respecting her conversations with Soriano and Merka. Though Respondent asserts, in its post hearing brief, that "the choice was clearly left up to Merka whether or not to accept James' help" in drafting a letter to the Union, it is not always so clear from the testimony how much of an option was given to her by James or with respect to what aspect of the matter she was told an option existed. In the case of both Soriano and Merka, James placed the telephone calls and began the conversations with the flat statement that Rudan wanted the nurses to come back or that she was calling the Filipino nurses back to work. In the case of Soriano, express mention was made of resignation from the Union and

it was made in connection with the procedure for returning to work. In the conversation with Merka, only letter-writing was suggested (according to Merka's testimony) without mention of resignation from the Union. James offered assistance in writing the letter.

Furthermore, to the extent that James' denials conflict with the testimony of Soriano, Merka and Young, I tend to credit the testimony of the nurses because I found many of James' responses to questions evasive. For example, when asked if she used Jo-Anne Marshall's name in her conversation with Merka, she replied that she could not remember; she conceded that she uttered Marshall's name once or twice, but could not remember which conversations were involved because she had spoken to hundreds of nurses. She had the same memory problem for the same reason with respect to critical facets of her conversation with Simmons.

James' testimony was disputed by the nurses on a number of points. On cross-examination as to who first mentioned resignation from the Union in the telephone conversations, James testified, with some lack of clarity, that one Filipino nurse, whose identity she could not recall, mentioned that she had been told by others that some nurses were avoiding Union fines by quitting the Union before returning to work. James did not claim that any such information was volunteered by Soriano, Young, Merka or Simmons, though both Simmons and Soriano testified that they had that information when they called the hospital and spoke to James. In Simmons' case, the matter of who first brought up the question of writing a letter cannot be resolved, for both Simmons and James professed to lack any sure recollection. James testified that she remembered nothing except that she

left the decision entirely to Simmons, as she had with all of the nurses to whom she had spoken. That is strange testimony, because Simmons was one person who demonstrably had no irresolution about what she wanted to do.

James' stated reason for making the inquiries was that Rudan had told her that a lot of nurses were crossing the picket line and returning to work but, because the Hospital did not know who was coming in, it was difficult to plan and open a floor. She testified that he asked that she make the survey so that they could plan. The nurses who testified indicated that it was the other way around: James told them they were needed because the Respondent wanted to open another floor of the hospital.

However, in most other instances of conflict between James' testimony and that of other witnesses,

either their credibility seemed evenly balanced on the particular point or the point itself was immaterial. For example, at least one nurse said she got Marshall's address from James, while James denied knowledge of the address of District 1199; however, if she had furnished the address it would have been within the permissible limits of employer assistance to employees seeking to withdraw from or decertify a union. In addition, it has to be noted that James' testimony regarding the reasons for her making the inquiries not only presents a highly plausible explanation, but is corroborated by Herbert's testimony that it was necessary to find out who was coming in because of the erratic behavior of some nurses, who came in for a day or two and then dropped from sight on account of the picket line.

I find that, on the entire record, all that has been established by a preponderance of the credible evidence is that James made numerous telephone calls during the months of July and August; that some of the calls were placed by her to members of the unit; that she asked those nurses whether they planned to come to work despite the strike; and that she spoke to some of them more than once. No other fact is established by a preponderance of the evidence in the record which, together with the foregoing, would support a finding that James' conduct placed Respondent in violation of the Act.

Bearing in mind that the nurses to whom James spoke knew that management would have liked nothing better than a mass defection from the Union, James' communication to them that management wanted them back at work said nothing that they did not already know. The

practical realities and the context in which the conversation took place cannot be ignored. It has been observed that ". . . any notification by a company to its employees of their right to withdraw from a union carries with it at least the notion that the company 'wants' the employees to withdraw." Cyclops Corporation, Tex-Tube Division, 216 NLRB 857, 858 (1975).

There are two major respects in which the charges have not been proved by a preponderance of the credible evidence.

The first is a failure to establish the precise meaning of James' remarks in the conversations in which resignation is shown to have been discussed. In those conversations, it is not at all clear whether James was pushing for defection from the Union or simply explaining that, in order for a nurse to cross the picket line and

return to work without becoming subject to a Union fine, the procedure she had to follow was to resign from the Union before coming back to work. None of the statements proved to have been made by James were so explicit that, on their face, they required one or the other of these two possible constructions.

The burden was therefore placed on the General Counsel to adduce proof which would have invested James' statements with a meaning which would have made them unlawful. The burden was not met.

In Soriano's case, James told her that before she could come back to work, if she wanted to, she would have to resign from the Union. There is no evidence in the record as to whether this remark is to be construed as an assertion that no return to work would be permitted by the employer except upon resignation from the Union, or that

return to work was impossible because the Union had a picket line in front of the hospital and a fine for crossing it could, as a practical matter, be avoided only by quitting the Union. Such clues as are contained in the record are not helpful to the General Counsel's case. At one point, in response to a direct question, she testified that James told her she could resign from the Union. The conversations were held against a backdrop of nurses quitting and returning to work through the picket line, with many of them angry at the Union. James' remarks may easily and reasonably be construed as a follow-up on the picket line situation, for Soriano testified that she had already heard, prior to receiving the call from James, that some nurses who had crossed the picket line had resigned from the Union first. It was a matter of common knowledge. Soriano and the other nurses

who testified were all concerned with the danger of incurring a Union fine if they crossed the picket line, and resignation from the Union had become an increasingly well-known means of avoiding the penalty, even on the part of some who favored Union representation. In any event, the fact remains that the worst reading of James' statement that the evidence supports would be that in order to come back to work they had to resign from the Union, if they wished to come back to work before the end of the strike without paying a fine to the Union. The decision was clearly left to the nurses, without coercion.

James' suggestion that Soriano join the New York State Nurses Association has not been shown to be anything other than suggestion to her by James of an alternate professional association if Soriano elected to quit

the Union. There is no evidence to support construction of the statement as recommendation of a different and preferable collective bargaining representative. (I did not credit James' denial that she had made the suggestion and I do not believe that the evidence submitted by Respondent that James has not been a member of the Association since October 1982 is probative as to whether or not she made the suggestion to Soriano.)

Taking Young's testimony at face value, the most extreme statement James is found to have made is the assertion that the strike could possibly be lengthy. That is a statement protected by Section 8(c) of the Act as a statement of opinion containing no threat of reprisal or force or promise of benefit, and, moreover, was made with respect to a point which is essentially ancillary to the issues of this case.

In Young's testimony, it is not made clear whether James simply told her to write to Jo-Anne Marshall if she wanted to resign, or told her she had to resign, or that she had to resign to come back under any circumstances, or even whether James only had reference to the problem of getting across the Union's picket line without incurring a Union fine.

In Simmons' case, as I have noted, the matter of who first raised the question of writing a letter cannot be resolved. However, nothing in Simmons' testimony suggests culpable conduct.

In contrast to Young's testimony that James used the word "resign" many times, Merka testified that James never told her to resign from the Union in any of the three telephone conversations that they had. She testified as follows:

JUDGE LAWRENCE: Did you ask her why you had to write to Ms. Marshall?

THE WITNESS: No, she told me. She just told me, you know, to -- she just give me the name of Ms. Marshall to write to her in order to return to work.

It is possible to interpret that testimony only as a statement clearly inferring some kind of linkage between writing to the Union and returning to work. The nature of the linkage, however, is altogether unproven. Returning to work was the only possible subject a letter could be written about, but whether that entailed a statement of resignation from the Union by Merka and the true objective of such a resignation are matters on which there is no decisive evidence in the record.

The second respect in which I find failure of proof on a critical issue is the failure to establish the

existence of coercion by a preponderance of evidence.

In none of the communications between James and any of the four nurses whose testimony I have just reviewed is there any statement which can reasonably be construed as coercive in tone, intent or probable effect. I am excluding from consideration their unanimous testimony that they felt no coercion or pressure as well as the fact that, except for Simmons, who, on her own initiative had called the hospital and reached James, they did not, in spite of James' statements, quit the Union and return to work. The statements made were devoid of coercion. James told the nurses that the Hospital administration would like the nurses to return to work and that <u>if</u> they wanted to return, which the nurses all knew could not be done without crossing the picket line and incurring a fine, the hospital administration would

help them get letters out to the Union. Such assistance would have been purely ministerial and within the permissible limits established by Board precedents. There were no promises and no threats.

I have taken into consideration the emphasis which James is alleged to have placed on the probable duration of the strike and on the return of many nurses to work after quitting the Union, and I have considered the fact that James made more than one telephone call to two of the nurses. Nevertheless, it is clear from the witnesses' testimony that throughout the conversations the option was left with them whether to quit the Union and return to work or sit out the strike.

Merka testified that her conversations with James were friendly in tone.

Simmons' testimony patently demonstrated the absence of coercion on the part of James in her case.

As a final note, the absence of testimony from anyone else should be noted. There were approximately 100 nurses in the unit, but the General Counsel's case rested on unclear testimony from only a few of them. Accordingly, I find no violation of Section 8(a)(1) of the Act by reason of James' conversations with any of the four nurses who testified.[4]

F. Aid to the Decertification Movement

1. The Union Decertification Fact Sheet

The Respondent prepared a fact sheet laying out the procedures for Union decertification. The Respondent contends that it was not prepared for

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4. Respondent's Second and Third Defenses are hereby dismissed as inapplicable to the alleged violations involving James. James' remarks were not in the nature of "views, argument, or opinion" within the protection of Section 8(c) of the Act and the First Amendment to the Constitution of the United States.

circulation among the nurses, but for the edification of Herbert. Herbert testified that upon the commencement of the strike on 13 July she began receiving telephone calls from irate nurses asking her about decertification and she asked Carol Handfus to "research it."

The document supposedly produced by Handfus, a two-page memorandum entitled "Union Decertification Fact Sheet," reads like a call to arms. It begins with a declaration that employees who no longer wish to be represented by the Union and want to remove it "have the right" to do certain things. There follows four paragraphs outlining the procedure. Methods of preserving anonymity on the part of signers are set forth and reassurance is given that the NLRB keeps such names secret. It is noted, in tone of alarm augmented by underscoring, that

the signatures must be submitted "to the NLRB before a new contract for the RN's is signed. Once a new contract is in effect, decertification will be impossible. . ."

The memorandum concludes in the following fashion:

> (4) The law (National Labor Relations Act) says you are not required to have a union representing you if you do not wish to be represented by the union.
>
> You can be sure that the federal law stands behind you and that you are protected in a decertification effort by the power of the Federal Government and the courts.

Herbert testified that the pronoun of the second person was employed in the memorandum to facilitate her answering telephone inquiries by simply reading from it. I do not credit that explanation because it is belied by the bellicose tone of the memorandum. All that is proved, however, is that Handfus prepared a memorandum for

Herbert's use which on its face exceeds the permissible limits of employer assistance to employees seeking information about decertification and which sounds like a summons to combat. There is no proof that the memorandum was distributed or its contents read over the telephone or otherwise disseminated. The only evidence that it ever found its way outside of Herbert's office is her testimony that she momentarily forgot an envelope containing it in a meeting room and testimony by Mary Callan, a staff nurse, that she found of copy of it under her door. Callan testified that she made no inquiries as to how it got there. Her testimony is suspicious. If credited, however, it suggest that the memorandum was intended to be, and to some extent was, distributed, but does not prove that it was in fact distributed by the Respondent. Ajdari did not see it until

later. It is possible that someone, knowing Callan's anti-union feelings, to which she testified, felt that delivering a copy to her would be more effective than a wholesale distribution. In fact, it was. Callan testified that she was delighted to get it and went right down to the Board office to file a petition, only to discover that Ajdari had already been there. The identity of that person and his or her connection to Respondent, however, are unproved.

The circumstances of the delivery of the memorandum to Callan remain a mystery, which means that the General Counsel has not established a violation by a preponderance of the evidence. Speculation cannot be substituted for evidence. There is no evidence that any persons other than Handfus, Handfus' secretary (who typed it), Herbert, Callan and, later, Ajdari

ever read it. There is no evidence that it was read over the telephone to anyone by Herbert. There is no evidence that Respondent acted on it, whatever the intentions may have been. There was no evidence to explain why Respondent would have instigated Callan to file a decertification petition if Ajdari had already done so. And all of this remains true if Callan's testimony is not credited.

2. Meeting of 28 August

On 28 August, at 1 o'clock in the afternoon, Francis Carling, an attorney for the hospital, addressed a meeting of 25 or 30 nurses in the Doctor's Lounge. The complaint alleges that the Respondent "discriminatorily granted aid . . . to those of its employees seeking to decertify the Union by granting paid time off from work to its employees in the unit . . . to facilitate their attending" the meeting

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"wherein decertification of the Union was discussed."

The organizer of the meeting was Farideh Ajdari, the staff nurse who had filed the petition for decertification on 18 July (having been one of the nurses who inquired of Herbert respecting the procedure). She testified that she got permission to use the Doctor's Lounge on 28 August and invited Carling to address the meeting.

With respect to the object of the 28 August meeting, Respondent asserts in its post hearing brief that it was a meeting of, by and for the nurses to discuss the recent blocking of the election. The General Counsel contends that it was a meeting called by anti-Union nurses for the purpose of asking Carling about decertification and their other legal options. That is, in effect, a concession that it was the nurses' own meeting. The evidence shows

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that the nurses did not draw fine legal distinctions, but sought assistance on the whole problem of getting back to work. Decertification inevitably was mentioned. The election had been blocked. According to Ajdari, the organizer of the meeting,

> . . . we wanted to do something else because we were so desperate that there's nothing being done and they already delayed the election, and the majority of nurses already crossed the picket line. They wanted to know what is their options and if the law would permit them to do something else to proceed in their -- because they were very dissatisfied with the union.
>
> So, we started to do something else. I called some of my friends and we talked about it together and that's what we did. We started collecting more signatures.

In short, with the election blocked by reason of the filing by the Union of the unfair labor practice charges, the nurses were advised by Carling to request withdrawal of recognition of the Union.

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Counsel for all parties stipulated at the hearing that Respondent permitted the nurses to attend the meeting at 1 o'clock, did not dock them for overstaying the lunch hour and the subject of decertification of the Union was discussed at the meeting. Parvan Valentini, a staff nurse who attended the meeting, described it. She testified that approximately 20 nurses attended. Ajdari introduced Carling and stated that he was there to answer any question that they had. Carling stated that he had been invited by Ajdari and that management had nothing to do with the meeting, and that he was there to answer any questions they had about the strike. Valentini attributes a statement to Carling to the effect that they could get the Union out if 51% of the nurses came back and resigned from the Union. He repeated the statement when Valentini pointed out

that not all of the nurses who had resigned in order to return to work without being fined actually wanted the Union out. He also stated that he expected the strike to last for a long time because Marshall had not kept an appointment for a negotiating session. He then left. The meeting ended at about 2 o'clock.

Valentini also testified that on the morning of 28 August James conferred with Partik and they rearranged the lunch hour of the registered nurses whom Partik supervised in order to enable them to attend the meeting. Her testimony in this regard is uncontroverted, for Partik was not called as a witness by Respondent and James, who testified both before and after Valentini, was not asked about it. Herbert's explanation was that at the time there was no normal scheduling. Schedules were disrupted by the strike

and the nurses took their lunch and breaks as and when they were able to while they worked the excessively long hours necessitated by the strike, and noone was actually excused from duty to attend the meeting. In a way, Valentini's testimony and Herbert's testimony are in accord that no nurse was released from duty to attend the meeting, for had they been released there would have been no need to rearrange the lunch hour.

I find that James and Partik made arrangements to facilitate nurses' attendance at a meeting called by anti-Union nurses to find out what they could do legally about getting rid of the Union. In doing so, however, James and Partik were not inducing any persons to attend the meeting nor seeking to influence decisions on issues which were on the agenda of the meeting. They were making it easier than it might otherwise

have been for the persons who wished to attend the meeting during their lunch hour to exercise the rights guaranteed them by Section 7 of the Act. The fact that some nurses may have overstayed the lunch hour and were not docked is immaterial, for in failing to clock the nurses to the minute, the Respondent has not been shown to have given disparate treatment to them as compared to the treatment which it had customarily accorded to persons attending Union meetings. Under the circumstances, I perceive no violation of the Act.

G. Alleged Offenses Under Section 8(a)(5) and (1)

The General Counsel contends that Respondent violated the Act by express withdrawal of recognition of the Union on 7 September and by actions which it thereafter took inconsistent with the recognition to which the Union was entitled.

1. Withdrawal of Recognition

On 7 September, Dr. George A. Sarkar, the Executive Director, sent a letter addressed to Jo-Anne Marshall, the Executive Vice President of Distirct 1199, withdrawing recognition of District 1199 as bargaining agent for the Registered Nurses and advising that Respondent would not attend the negotiating session scheduled for 10 September. The letter set forth the following bases for the withdrawal of recognition: (1) as of 27 August, while the strike was still in progress, a majority of the Registered Nurses had crossed the picket line and returned to work; (2) the belief that many, if not all, of the nurses who did so had resigned from the Union; (3) receipt by Dr. Sarkar, on 7 September, of a "petition signed by a majority of the bargaining unit nurses" requesting management to withdraw recognition; (4)

the belief based on the foregoing facts that District 1199 no longer represented a majority of the Registered Nurses employed at the hospital.

At least one statement contained in the letter appears to be technically contrary to fact, for there appears not to have been one document signed by the nurses in the form of a petition, but rather a submission to Herbert by Ajdari of index cards signed by nurses which she had been collecting under cover of the previously quoted letter dated 6 September setting forth that because a majority of the nurses no longer wished to be represented by District 1199, she was submitting the cards and requesting that management not negotiate further with the Union.

The General Counsel attacks the Respondent's action on the grounds that it was taken without foundation in any reasonable belief based on objective

considerations and that the withdrawal was tainted because it was done in a context of unfair labor practices committed by Respondent. The General Counsel's position is based more on argument that on evidence. The General Counsel raised questions regarding a number of details, some of which were immaterial, but resolved none of them by presentation of evidence supporting the allegations of the complaint. She pointed to the fact that the presence of four or five per diem nurses who were on duty at the hospital may have had some effect of calculation of a majority, without offering proof as to what the effect was. She pointed out that Herbert may not have had all for the cards in her possession on 6 September, when Herbert and Sarkar conferred and the decision to withdraw recognition was made. There was uncertainty in Herbert's testimony regarding the actual

number of cards there were in her possession, on that date and the next day, when the letter went to the Union. There was also evidence that she received cards thereafter, one of which was dated as late as 30 September. These questions were raised inconclusively and do not affect the thrust of the weight of the evidence. At the same time the General Counsel raises questions such as these, and asserts, in the post hearing brief, that Respondent acted too hastily, it is also set forth that "Respondent was anticipating the presentation of the cards by Ajdari and wasted no time withdrawing recognition. When Herbert was presented with the cards she told Ajdari, 'I was very surprised that this has been <u>accomplished</u> . . .'" Underscoring was supplied by the General Counsel for emphasis. What it emphasizes, in my estimation, is the

glee and sincerity with which Herbert accepted Ajdari's count of the cards and took them to Sarkar's office. In doing so, she patently acted in the belief that the fervently desired majority in favor of withdrawal had been achieved. She happily issued a memorandum to all the nurses announcing what she regarded as good news. Herbert's elation at Ajdari's "accomplishment" is the most eloquent evidence of her sincere conviction that the Union had lost its majority.

Ajdari testified that she had worked under great anxiety that she might not get enough signatures before negotiations were scheduled to resume on 10 September. She stopped collecting as soon as she thought she had a majority. When she had collected the decertification cards and filed them with the Board, she had stopped at 30. She testified that in the period before

the election (scheduled for 30 August) she and her friends did not try to persuade anyone else how to vote "because we had already majority of the nurses . . . expressing their feeling that they do not want to stay in the Union and that they had crossed the picket line already and they wanted to come back to work." After the election was postponed, she estimated 54 or 55 nurses were back at work, though she was uncertain as to the exact number. She began collecting signatures on cards requesting withdrawal of recognition when nurses began calling her and pressing for some action before negotiations resumed on 10 September. (This time she bought the index cards and Mary Callan typed them.) Five other nurses helped her get signatures. She testified they collected signatures over a period of two or three days, stopping at 51 because that was a majority and 10 September was drawing close.

Ajdari testified she was committed to the cause of getting rid of the Union deeply enough to have paid the cost of the meeting room at the Barbizon Hotel out of her own pocket. She and Herbert both believed that a majority of the nurses had signed cards requesting withdrawal of recognition. (I note that in this instance she referred to 51 cards as a majority whereas she had referred to 30 cards as a majority in connection with the decertification petition, but I ascribe this to loose use of the word, "majority." She obviously was referring to the legal numerical requirements in each of these two separate situations.)

I credit Herbert's and Ajdari's testimony respecting their belief and reject the General Counsel's contention that it was incumbent upon Herbert to check the current payroll to make sure of the majority. I am not dissuaded

from this conclusion by Herbert's admission of uncertainty about the exact number of cards in hand when Sarkar signed the letter to the Union. The evidence is substantial that Ajdari, Herbert and Sarkar, who relied on Herbert when he signed the letter withdrawing recognition, believed that a majority for withdrawal of recognition had been achieved by Ajdari. Their behavior -- Sarkar's inquiry of Herbert as to the existence of a majority, her assurance that it was there, the discussion of where to keep the cards, the decision to put them in the safe and the telephone call to counsel, who at the time was in London -- all of these actions were behavior consistent with their asserted belief that the majority had been achieved, regardless of what the number was. Sarkar took the kind of precautions which would have been expected to be taken by a person in his

position who contemplated such an important and legally momentous step. I find that Respondent's withdrawal of recognition was based upon a bona fide belief that a majority in favor of withdrawal of recognition existed among the nurses and that a majority of the nurses were already back at work. There is no evidence, in fact, that as of 7 September a majority had not been achieved.

Since I have not found that unfair labor practices were committed prior to 6 September, no question is presented as to whether Respondent's withdrawal of recognition was "tainted" thereby.

2. Actions by Carol Handfus on 12 September and 9 October

The Respondent, in its answer, admits allegations that "Respondent, by Handfus, on or about September 12, 1984, instituted wage increases, pension,

health and insurance plans" and that Respondent "on or about October 9, 1984, instituted a new grievance procedure." In each case, Respondent has alleged that at the time, recognition of the Union had been withdrawn. Since no collective bargaining agreement was in effect covering the nurses and Respondent had withdrawn recognition of the Union in the bona fide belief that a majority of the nurses in the unit favored such action, there was no legal impediment to unilateral implementation of wage and benefit arrangements or to the promulgation of new grievance procedures. The alleged actions by Respondent were not in violation of the Act.

3. Cancellation of Union Meetings scheduled for 16 October

On 1 October, Respondent sent District 1199 a letter confirming reservation of the second floor

conference room "for your Chapter Meeting for the Hospital and Guild Division being held on Tuesday, October 16, from 8:00 a.m. to 5:00 p.m." Written confirmation was requested.

On 10 October, Handfus sent the Union a second letter, referring to the first letter and to conversations which had preceded it. Recalling that the authorization which had been granted had been limited to meetings of the Hospital and Guild Division employees, whose bargaining units were still represented by the Union, the letter concluded, "Despite these very specific conditions, I learned today that leaflets were distributed throughout the Hospital announcing a meeting including the R.N.'s. Under these circumstances, the Hospital has cancelled your reservation and no space will be made available to you at this time."

The General Counsel's contention that the Respondent thereby violated Article V, Section 2 of the collective bargaining agreement, which carried forward into the renewal negotiation period, and thus violated tne Act, is based on the presupposition that recognition had been unlawfully withdrawn. As I have found that it was not unlawfully withdrawn, the section is inapplicable. However, it would have provided little support for the Union's position in any event, for the terms of the collective bargaining agreement did not allow the Union the access which was demanded by the Union after its expiration. Article V, Section 2 provided as follows:

> 2. A representative of the Union shall have reasonable access to the Employer for the purpose of conferring with the Employer, delegates of the Union and/or Employees and for the purpose of administering this Agreement. Where the Union representative finds it necessary to enter a department of

> the Employer for this purpose, he/she shall first advise the personnel office or the head of the department or his/her designee in person, as the Employer shall state. A delegate intending to go to a department other than the one he/she represents shall follow the above procedure. Such visits shall not interfere with the operation of the Employer.

The Union scheduled meetings with employees in bargaining units other than that of the registered nurses, for all of the shifts, on 16 October. Arrangements were discussed with Handfus in advance. They were then confirmed in writing. It was clearly understood that the nurses were not to be involved in the meetings, yet the Union persisted in circulating flyers inviting them to the meetings and Union representatives began approaching the nurses in the common areas of the hospital to solicit their support. There is no conflict in the evidence respecting the Union's patent violation of the understandings reached with respect to the meetings. Under the

circumstances, the Respondent did not violate the Act by insisting upon the Union's adherence to the understanding previously reached and withdrawing the authorization for the use of space in the hospital.

4. Confrontation on 16 October

I mentioned the fact that the Union did not respond to the Respondent's letter of 10 October. Three organizers showed up for the meetings on 16 October. They entered the cafeteria and conversed with both the registered nurses and members of the units whom they continued to represent. They were invited to leave the cafeteria, and did, but they congregated in the lobby and refused to leave for more than seven hours despite repeated requests from hospital personnel and the police, who were summoned by the Respondent toward the end of the day. The police arrested them. Following

this imbroglio the Union filed additional charges, resulting in new allegations that, without prior notice to the Union and without affording the Union an opportunity to negotiate as exclusive representative of the Respondent's registered nurses, Respondent, acting through Handfus, instructed the Union representatives to leave the cafeteria and promulgated a rule requiring prior permission before they entered the cafeteria or lobby area of the hospital; that Respondent "by its agent" instructed Union agents to leave the hospital and caused the arrests of "Union organizers" by the police when they refused to leave; that Respondent, acting though Barbara DeVito, a personnel department representative, promulgated a rule restricting access by Union representatives to the library; and that these actions were taken to prevent the Union representatives from

meeting with and representing Respondent's registered nurses.

The General Counsel contends that the Respondent's actions contravened the reasonable access clause of the collective bargaining agreement and past practice of the parties, and that the access provisions survived the expiration of the agreement. At the same time, the General Counsel argues that the grievance and arbitration procedures are not available to Respondent, and therefore Respondent must answer in these proceedings alleging unfair labor practices, because those provisions do not survive the expiration of the collective bargaining agreement. (The General Counsel raises an additional argument in the post hearing brief to the effect that the Respondent's actions violated "the Master Agreement which was in effect on October 16, 1984," but there is no

allegation pertaining to same in the complaint and no evidence was offered respecting the agreement to which reference is made.)

The Respondent does not dispute most of these allegations, but denied the allegations that the cafeteria is open to non-employees of the hospital, that the Union was required to get prior permission to enter the lobby, that the Union represented the nurses, that the Respondent's actions were taken without prior notice and that the Respondent's actions violated Section 8(a)(1) of the Act. While arguing that no collective bargaining agreement was in effect at the time and that "an employer is not obligated to allow a union whatever access it may demand" the Respondent argues that the Union should have resorted to the grievance and arbitration procedures provided for in the collective bargaining agreement. In

its post hearing brief, Respondent chastises the Union for concededly trying to maintain contact with the registered nurses and trying to compel Respondent to deal with the Union as their representative, ignoring the Union's contention that it still represented the nurses and was entitled to recognition as their bargaining agent.

My finding that the Respondent withdrew recognition on 7 September in the bona fide belief that the Union no longer represented a majority of the registered nurses in the bargaining unit leads inexorably to the conclusion that Respondent acted lawfully in promulgating the rules complained of without prior notice to, or consultation with, the Union. The Union organizers' entry upon the premises without making prior arrangement with the hospital administration was a violation of the access clause of the collective

bargaining agreement, and in the period following its expiration and the withdrawal of recognition, the Union had even less right to be on the premises. The Union's position in this regard is not helped by the testimony of Lisa Heelan, a Union organizer, that she told Handfus at the beginning of October that more than 51% of the nurses had signed a petition requesting the Union to represent them, for Heelan also testified that Handfus asked to see it and she refused to show it to her.

The General Counsel attempted to counter the Respondent's argument that exclusion of the Union representatives from the cafeteria was lawful with testimony by Heelan that she had been subjected to verbal abuse by a hospital official for using the cafeteria on 28 August. I find no relevancy therein to the issue of Handfus' right to exclude them in

October and I note also that there is insufficient evidence respecting that hospital official's status and authority and the overall effects of his conduct to make Heelan's testimony meaningful and material.

Testimony by Mary Ann Steel, another organizer, to the effect that she and Heelan were approached by a security guard in the cafeteria one Friday earlier in October and told that he had been instructed to remove them from the premises, similarly relates to an event in October, after withdrawal of recognition.

The General Counsel contended that the cafeteria was, in fact, open to the public. The testimony is in conflict on that point. However, the only evidence that persons other than employees used the cafeteria, other than certain specific persons conceded to have been allowed to use it by

Respondent (contractors and the hospital's ladies' anxiliary) consists of Steele's testimony that on 16 October there were three ladies in fur coats sitting in the cafeteria at lunchtime. There was no evidence as to who they were, so their presence does not support an argument that the place was a public cafeteria. I credit Herbert's testimony that the cafeteria is not open to the general public and that there is a sign on the door saying, "Employees Only." She further testified that the only persons who use the cafeteira other than hospital staff were contractors working in the building and the women's auxiliary and that the nurses have instructions that the patients' families are to be told that the cafeteria is not a public facility and is not available for their use.

The hospital lobby is, of course, an area used by patients,

visitors, doctors, hospital personnel and others having business with the Respondent. Respondent denies having promulgated any rule excluding its use by Union representatives. The testimony of Steele and Heelan leads me to credit the denial. Steele's testimony concerning events on 16 October was to the effect that on that date she met Heelan and Diana Thomas, another organizer, in the lobby. Between 7:00 a.m. and 7:30 a.m., they went to Handfus' office to let her know their whereabouts in the institution, presumably in accordance with the procedure called for by Article V, Section 2 which I have previously quoted. They said they were going to the cafeteria and "that if we intended to go or enter any department, we would inform her which is customary and that's per the contract." Handfus told them again that she should be informed where

they were going, but at that point they had no plans to enter any particular department. They went to the lobby to await the arrival of Jo-Anne Marshall and another Union official, and then they all went to the cafeteria. At lunchtime, Handfus approached them there and announced "that the cafeteria was off limits to us."

No statement by Handfus is quoted which prohibits their use of the lobby. Heelan testified as follows respecting the statement made by Handfus, in the present of Diana Thomas and Mary Steele:

> Q. Did you have a conversation -- Did Ms. Handfus speak with you in the cafeteria?
>
> A. Yes, she did. She came down and said that in the future we would need permission to be in the cafeteria, you know, and that we really should not be in the lobby.

The distinction between access to the cafeteria and access to the lobby is

explicit in the very statement made by Handfus. There is a self-evident difference between the reference to the undesirability of, rather than the prohibition against, loitering in the lobby. There is, therefore, no evidence that a rule against Union representatives' use of the lobby was announced.

What Heelan's testimony does establish is that loitering in the lobby was warned against, notwithstanding which the Union officials returned to the lobby, after unsuccessfully attempting to seek Sarkar, and remained there the entire afternoon. At the end of the afternoon, Handfus came down to the lobby with counsel for the Respondent, who demanded that they leave. When they refused, he called the police. Steele, Heelan and Thomas were arrested at about 6:30 p.m.

Though the Union still represented other hospital employees, the testimony leaves no doubt that the organizers who refused to leave the lobby on the afternoon of 16 October were there for the sole purpose of contacting the nurses as they entered and left the building. Recognition of the Union as the representative of the nurses having been expressly withdrawn about five weeks before and the hospital lobby not being a public place, the Union organizers should have conducted their business outside the building. They were arrested, not because of their violation of a rule promulgated to the effect that they could not enter and remain in the lobby, but because they were refusing to leave a private building at an hour when the hospital offices were closing and the responsible officials of the Respondent were leaving for the day.

I find that no rule was promulgated with respect to presence of Union personnel in the hospital lobby. The Act was not violated by the promulgation of a rule excluding Union organizers from the cafeteria and the hospital library or by the summoning of police and the causing of the arrest of the organizers who refused to leave the lobby. That these actions were not taken to prevent the Union representatives from meeting with and representing Respondent's registered nurses in a lawful manner is apparent from Steele's testimony that on the afternoon of the 16th of October, when Handfus met with them and with Jo-Anne Marshall and another Union official, Handfus offered them the use of office space in the hospital. According to Steele, they considered the offer very generous, but did not accept it pending consultation with higher Union officials.

Conclusions of Law

1. Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in unfair labor practices within the meaning of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:

ORDER[5]

The complaint is dismissed.

Dated: Washington, D.C. 16 August 1985

Harold B. Lawrence
Administrative Law Judge

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5. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adoped by the Board and all objections to them shall be deemed waived for all purposes.

280 NLRB No. 11 New York, NY

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MANHATTAN EYE, EAR
AND THROAT HOSPITAL

and Case 2--CA--20501
2--CA--20571
2--CA--20590
2--CA--20710

DISTRICT 1199, HOSPITAL
AND HEALTH CARE
EMPLOYEES UNION, RETAIL,
WHOLESALE AND DEPARTMENT
STORE WORKERS UNION,
AFL--CIO

DECISION AND ORDER

On 16 August 1985

Administrative Law Judge Harold B. Lawrence issued the attached decision. The General Counsel and the Charging Party Union filed exceptions and supporting briefs and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge dismissed the complaint in its entirety, finding that the Respondent did not violate Section 8(a)(1) as alleged and did not violate Section 8(a)(5) and (1) by withdrawing recognition from the Union and thereafter unilaterally instituting changes in employees' terms and

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[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

conditions of employment. The judge dismissed the 8(a)(5) and (1) allegations based on his finding that the Respondent had a good-faith doubt of the Union's majority status at the time of the withdrawal of recognition and that it occurred in a context free of unfair labor pratices. The judge concluded that the Respondent was thereafter privileged to change unilaterally employees' terms and conditions of employment. As explained below, we disagree with the judge's dismissal of the allegations that the Respondent, through Supervisor James, violated Section 8(a)(1) by soliciting employees to resign their union membership, and further disagree with his dismissal of the allegations that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union and thereafter unilaterally

changing certain terms and conditions of employment.[2]

The record shows that the Union had represented a unit of approximately 101 registered nurses at the Respondent's hospital since 1980. The parties' most recent collective-bargaining agreement expired on 13 June 1984,[3] and the Union commenced an economic strike on 13 July. On 18 July Farideh Ajdari, a registered nurse, filed a petition seeking to decertify

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[2] While the judge dismissed all of the 8(a)(1) allegations, exceptions were filed only to his dismissal of the allegations that Supervisor James solicited employees to resign their union membership, that the Respondent unlawfully distributed a union decertification fact sheet, and that the Respondent unlawfully granted its nurses paid time off to attend a union decertification meeting. We note additionally that no exceptions were filed to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) and (1) by restricting the access of union representatives to the hospital.

[3] Hereafter, all dates refer to 1984.

the Union. An election was scheduled for 30 August, but it was postponed because of the filing of the unfair labor practice charges. Subsequent to the postponement of the election. Adjari gathered new cards from 51 nurses which indicated that they no longer wished to be represented by the Union. Ajdari presented these cards to the Respondent's director of nursing, Herbert, on 6 September and on the following day the Respondent notified the Union that it was withdrawing recognition based on the following factors: a majority of nurses had crossed the picket line and returned to work; the Respondent's belief that many, if not all, nurses who did so had resigned from the Union; a petition signed by a majority of the nurses requesting management to withdraw recognition. Around 12 September the Respondent implemented a wage increase

and pension, health, and insurance plans and in October instituted a new grievance procedure.

At the hearing, four of the Respondent's nurses testified concerning the allegation that the Respondent's admitted supervisor, James, had solicited employees' resignations from the Union. Thus, nurse Soriano testified that James phoned her at her residence in July and indicated that she was calling on behalf of the Respondent's director of nursing, Herbert, and director of education, Rudan, to ask the Filipino nurses to return to work. Soriano testified that James said, inter alia, "Before I could go back to work, I have to write to Joann Marshall[4] resigning from District 1199 and then I can join the

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[4] Marshall is an official of District 1199.

New York State Nurses Association." Soriano replied: "I'll just let you know when I feel like going to work." Nurse Young testified that James phoned her around 26 July and said that "a lot of nurses had signed a petition that they were resigning from the union because the union is not assisting any more and it's not a professional union." Young added that James "told me to write to Joann Marshall if I wanted to resign also from the union . . . [and] send it by certified mail." Young responded: "I'll just going to wait until the strike is over and that's all." Young testified that James phoned her again a week later and told her that "almost all the nurses are resigning already . . . that they were coming back to work and if you want to be interested to come back, you can come back any time . . . but you have to resign first from the union before you can come back to

work." Young replied, "I'm not coming back to work until the strike is over." Nurse Merka testified that James phoned her at home around 27 July indicating that she "had been asked by Mr. Rudan to call the Filipino nurses to return to work." Merka responded that, "I could not answer you right now. I don't understand what's going on." James called Merka a second time about a week later. Merka testified that James remarked that "you're still not back to work" and told Merka to "write to Ms. Joann Marshall." Merka testified that James said that "if I need some help to write, she could help me to write the letter that I will no longer be a member of 1199." Merka said that she and James did not discuss the possibility that the Union might try to fine or punish workers if they crossed the picket line. Nurse Simmons testified that she called the hospital toward the end of

the strike because she wanted to know the procedure for returning to work. Simmons spoke with James who told her "that I should write a letter to Joann Marshall . . . that I resign from 1199 and send it certified letter." James gave Simmons the format for the letter resigning her membership. Simmons also testified that James did not mention anything about being fined if she did not resign from the Union. Simmons said she did not remember who raised the topic of resignation.

The judge found that "to the extent that James' denials conflict with the testimony of Soriano, Merka, and Young, I tend to credit the testimony of the nurses because I found many of James' responses to questions evasive."[5] In those other instances where the judge did not specifically

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[5] James' testimony is detailed in the judge's decision.

credit the employees' testimony over that of James, he found either that "their credibility seemed evenly balanced or the point itself was immaterial." Thus, at no point was James herself affirmatively credited by the judge. Nevertheless, as noted above, the judge concluded that the Respondent, through James, had not violated Section 8(a)(1) by soliciting resignations from the Union. He found the testimony insufficient to establish this allegation in several respects.

Preliminarily, the judge concluded that the General Counsel failed "to establish the precise meaning of James' remarks in the conversations where resignation was discussed." He found it unclear whether James "was pushing for defection from the Union or simply explaining that, in order for a nurse to cross the picket line and return to work without becoming subject

to a union fine, the procedure she had to follow was to resign from the Union before coming back to work." The judge also concluded, erroneously, that Soriano and all the other nurses who testified were all concerned with incurring a fine if they crossed the picket line. In this regard we note first that neither Merka, Simmons, Young, nor Soriano testified that James' remarks concerning resignation from the Union occurred in the context of a discussion of the procedure for returning to work without incurring a union fine. In fact, Merka and Simmons each testified that the possibility of fines was not discussed in their conversation with James. The testimony of Young and Soriano is devoid of any indication that James' remarks were raised in this context. Moreover, James herself denied having discussed the topic of resignation with Soriano. We

further note that, contrary to the judge's assertions, there is no evidence that Soriano and all the other nurses who testified were concerned with incurring a fine if they crossed the picket line. In light of the nurses' clear testimony regarding James' statements to the effect that they had to resign their union membership before returning to work and the absence of any testimony that James' remarks occurred in the context of a discussion about the avoidance of union fines, there is no basis for concluding that James merely was explaining the procedure for avoiding union fines.[6]

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[6] The judge characterized Soriano's testimony in this matter: "I detect no uncertainty [in Soriano's testimony] whatsoever: she testified that James told her she 'could' write to Marshall and 'could not' come back to work without having done so." And, the judge described Young's testimony in a similar

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The judge additionally concluded that the General Counsel failed to establish the existence of coercion by a preponderance of the evidence. In this regard, we note that an employer does not violate the Act merely by providing employees with information on how to resign from the union "as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation." R. L. White Co., 262 NLRB 575, 576 (1982). Contrary to the judge, we find that James'

(Footnote continued from previous page)

> fashion: "Young's testimony was a coherent, consistent and credible account to the effect that James called her and told her that other nurses were returning to work and that she could return if she quit the Union."

conversations with the employees went beyond the mere providing of information and constituted unlawful solicitation of resignation from the Union. Thus, as noted above, it is clear from the testimony here that James solicited resignations from the Union and conditioned return to work on resignation from the Union. Additionally, James evidenced a continuing interest in knowing whether or not the nurses intended to resign and return to work and in some instances offered assistance. James explicitly stated that she was calling on behalf of her superiors. James thereby created a situation wherein employees would tend to feel imperiled in maintaining their membership. Erickson's Sentry of Bend, 273 NLRB No. 11 (1984). In so doing, James' conduct, aimed at causing disaffection from the Union, clearly tended to interfere with the employees'

free exercise of Section 7 rights and was unlawful interference, contrary to the judge, regardless of whether there is evidence that James actually achieved a coercive effect. Amason, Inc., 269 NLRB 750 fn. 2 (1984), enfd. mem. 758 F.2d 648 (4th Cir. 1985). Thus, contrary to the judge, we find that James' conduct was not merely "ministerial" assistance proffered to the nurses[7] and that the Respondent, through James' conduct, violated the Act.

[7] The judge also noted that only 4 of the approximately 100 nurses in the unit testified concerning James' remarks. We note that, although James may have confined her unlawful conduct to only four employees, this does not make the conduct any less unlawful. Nor does it satisfy the Respondent's burden of establishing that its asserted objective considerations arose in an atmosphere free from coercion in support of its affirmative defense of good-faith doubt of the Union's majority status. We note also in this regard that the judge apparently did not consider the

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Having found this violation, we further find that the Respondent's asserted good-faith doubt of the Union's continued majority was not raised in a context free of unfair labor practices of the type aimed at causing disaffection from the Union. Therefore, the withdrawal of recognition, as well as the Respondent's later unilateral changes in employees' terms and conditions of employment, violated Section 8(a)(5) and (1). See Craftool Mfg. Co., 229 NLRB 634 (1977), and cases cited therein. We also shall provide an

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testimony of nurse Parvan Valentini which was proffered in support of another allegation. Valentini which was proffered in support of another allegation. Valentini testified that she called James on 19 August and asked about the strike situation. Valentini testified that James told her that "if you wish to come back to work, you have to resign from the Union."

Order which remedies the violations found herein.[8]

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[8] In ordering the Respondent to make whole the employees for losses suffered by reason of its implementing new pension, health, and insurance plans, we note that the record is unclear whether the new plans were substitutes for preexisting benefit plans and whether any losses were incurred by this conduct. We shall order that the employees be made whole for such losses, if any, they may have incurred, and that the Respondent make the contributions to benefit trust funds, if any, which would have been made but for the Respondent's unilateral institution of pension, health, and insurance plans. Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld payments. We leave to the compliance stage the question of whether the Respondent must pay any additional amounts into benefit funds in order to satisfy our "make whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to

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ORDER

The National Labor Relations Board orders that the Respondent, Manhattan Eye, Ear and Throat Hospital, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from District 1199, Hospital and Health Care Employees Union, Retail, Wholesale and Department Store Workers Union, AFL--CIO, as the exclusive collective-bargaining representative of its registered nurses.

(b) Unilaterally instituting wage increases, pension, health, and

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> the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional adminstrative costs, etc., but not collateral losses. Merryweather Optical Co., 240 NLRB 1213 (1979).

insurance plans, and a new grievance procedure.

(c) Unlawfully encouraging or soliciting employees to resign from the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time registered nurses employed by Manhattan Eye, Ear and Throat Hospital at its

facility located at 210 East 64th Street, New York, New York, but excluding all other employees, guards and supervisors as defined in the Act.

(b) On request, restore the terms and conditions of employment in existence prior to the unlawful unilateral changes and make whole the employees for any losses suffered by reason of the unlawful unilateral changes and make contributions to the benefit trust funds, if any, which would have been made but for the Respondent's unilateral institution of the pension, health, and insurance plans.

(c) Post at its facility in New York, New York, copies of the attached notice marked "Appendix."[9]

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[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegations not specifically found herein are dismissed.

Dated, Washington, D.C. 30 May 1986

Wilford W. Johansen,
Member

Marshall B. Babson,
Member

James M. Stephens,
Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held in the United States Courthouse in the City of New York on the 6th day of February one thousand nine hundred and eighty-seven.

PRESENT:

HON. J. EDWARD LUMBARD,

HON. LAWRENCE W. PIERCE

HON. FRANK X. ALTIMARI

Circuit Judges,

- - - - - - - - - - - - - - - - - - - -x

NATIONAL LABOR RELATIONS BOARD,

Petitioner, ORDER

86-4147

MANHATTAN EYE, EAR AND THROAT HOSPITAL,

Respondent,

LOCAL 1199, DRUG, HOSPITAL & HEALTH CARE EMPLOYEES UNION, RWDSU, AFL-CIO,

Intervenor.

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Petitioner has applied to enforce an order issued against respondent, the Manhattan Eye, Ear and Throat Hospital ("the Hospital"), requiring the Hospital to cease and desist from certain unfair labor practices and to bargain with District 1199, Hospital and Health Care Employees Union.

Upon consideration whereof, and finding that there is substantial evidence on the record to support petitioner's determination, we grant the application to enforce its order.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

HON. J. EDWARD LUMBARD,

HON. LAWRENCE W. PIERCE,

HON. FRANK X. ALTIMARI,

Circuit Judges.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 31st day of March one thousand nine hundred and eighty-seven

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v. No. 86-4147

MANHATTAN EYE, EAR AND THROAT HOSPITAL,

Respondent,

LOCAL 1199, DRUG, HOSPITAL & HEALTH CARE EMPLOYEES UNION, RWDSU, AFL-CIO,

Intervenor.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondent, Manhattan Eye, Ear and Throat Hospital,

Upon consideration by the panel that heard the appeal, it is

ORDERED that the said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,
Clerk

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